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Adoption - Where the Mother of an Illegitimate Child Refuses to Permit the Natural Father to Legitimate the Child He Has the Right of "First Refusal" and His Consent to the Adoption of the Child by Strangers Is Unnecessary; the Mother's Consent Is Sufficient Relinquishment to Authorize the Court to Enter a Decree of Adoption. In the Matter of Adoption of Irby (Cal. App. 1964)

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RECENT CASES

ADOPTION — WHERE THE MOTHER OF AN ILLEGITIMATE CHILD REFUSES TO PERMIT THE NATURAL FATHER TO LEGITIMATE THE CHILD HE HAS NO RIGHT OF "FIRST REFUSAL" AND HIS CONSENT TO THE ADOPTION OF THE CHILD BY STRANGERS IS UNNECESSARY; THE MOTHER'S CONSENT IS SUFFICIENT RELINQUISHMENT TO AUTHORIZE THE COURT TO ENTER A DECREE OF ADOPTION. *In the Matter of Adoption of Irby* (Cal. App. 1964).

Sue, 14 years old, became pregnant by Jimmy, 17 years old, and they decided to get married in Las Vegas. Stopping overnight enroute they called their parents who persuaded them not to marry and to return home. Sue's parents thereafter sequestered her and refused Jimmy any opportunity to communicate with her. From the beginning Jimmy had wanted to marry Sue, and in his efforts to persuade Sue and her parents to permit the marriage he staged a suicide attempt. As a result Jimmy came within the authority of the juvenile court, and was placed under probation supervision. Prior to the baby's birth he offered to pay the medical expenses and to make a home for the child. Immediately after the birth Sue placed the child for adoption with Mr. and Mrs. Ellis. At all times pertinent Jimmy had declared publicly that he was the father and wanted to take the baby into his family. At all times pertinent Sue had objected to his taking the child. In the subsequent adoption proceeding instituted by Mr. and Mrs. Ellis, Jimmy intervened and asked that the proceeding be dismissed since he desired to raise the child himself. The trial court, relying on California Civil Code § 230, ruled that the father's prior acknowledgments of paternity and his offers to take the child into his family were insufficient to legitimate the child, and his consent was not, therefore, a prerequisite to the child's adoption by the Ellis family. On appeal the court held that when the mother of an illegitimate child refuses to permit the natural father to legitimate the child the father has no right of "first refusal" and his consent to adoption by others is not necessary. The mother's consent is sufficient relinquishment to authorize the court to enter a decree of adoption. *In the Matter of Adoption of Irby*, 226 Adv. Cal. App. 304, 37 Cal. Rptr. 879 (1964).

As authority for this holding the court cited, *inter alia*, California Civil Code § 230 which provides that the father of an illegitimate

child may legitimate it by publicly acknowledging the child as his own, taking it into his home, and treating it as his own. As indicated by the court, Jimmy had not succeeded in adopting his son under this statute since he had been prevented by the actions of Sue and her parents from receiving the child into his own home and performing the other acts statutorily required.¹

The court also cited California Civil Code § 224 in part, as follows: "A legitimate child cannot be adopted without the consent of its parents, if living; . . . nor an illegitimate child without the consent of its mother, if living; . . ."² One of the factors considered by the court in refusing to give the father "first right" was that the mother did not give her permission for the adoption of the child by its natural father.³ To bolster its use and construction of the quoted portion of California Civil Code § 224 the court cited *In the Matter of Adoption of Campbell*.⁴ The *Campbell* court cited California Civil Code § 224 and said that the "[C]ode section contains no ambiguous language and requires no interpretation . . ."⁵, referring to the absence of any requirement that the father consent to adoption by the grandmother. *Campbell* was cited by the *Irby* court to show that the father's consent is not a statutory requirement in the adoption of an illegitimate child.⁶ In *Irby*, however, the father did not contend that his consent was necessary, merely that he had a right to be given first consideration in the adoption of his own child. The court, however, apparently felt that the question of the father's right of "first refusal" of an illegitimate child was identical to the

¹ Although at the time of trial Jimmy attempted to show that he had complied with the provisions of the statute and had thereby adopted his child, in effect he was merely trying to block the adoption of his son by the Ellis family. In essence he requested an opportunity to qualify under the statute before the final adoption by the Ellis' made that course of action impossible. In such case CAL. CIV. CODE § 230 seems inapplicable, at least with regard to the right of "first refusal" since adoption by the father was not really at issue.

² 226 Adv. Cal. App. at 307, 37 Cal. Rptr. at 881.

³ *Id.* at 304-05, 37 Cal. Rptr. at 881.

⁴ 9 Cal. App. 2d 622, 51 P.2d 138 (1935). This case can be distinguished from *Irby*. In *Campbell* the maternal grandmother and the natural father of an illegitimate child wanted to adopt it. The natural mother was dead.

⁵ In the Matter of Adoption of Campbell, *supra* note 4, at 623, 51 P.2d at 139.

⁶ 226 Adv. Cal. App. at 307, 37 Cal. Rptr. at 881-82.

question of the father's consent.⁷ But it is submitted that the major issue in *Irby* was whether the mother's consent was necessary for Jimmy Bryant to adopt his son, and not whether the father's consent was required for the Ellis' to adopt the child.

Apparently the *Irby* court gave considerable weight to the possibility that to give the natural father the right of first refusal would produce undesirable effects in future cases. That the final decision in *Irby* was strongly influenced by this fear of future consequences is shown by the court's statement: "A rule which would give the father of an illegitimate child the right of 'first refusal' of the child would create the possibility of grave abuses in adoption proceedings. The market for babies is a seller's market."⁸ In support of this position the court cited Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715 (1950). An examination of the cited article, coupled with a logical appraisal of the quoted statement, does not identify any grave abuse which would constitute an insuperable obstacle to granting the natural father a right of "first refusal." Certainly the court could not have meant to intimate that the recognition of such a right would cause unscrupulous peddlers of babies to intentionally impregnate young maidens so that they might perpetuate their heinous trade by ensuring a steady source of the commodity! The court may have been implying that to grant a right of "first refusal" to the natural father would place him in a position to blackmail prospective adoptive parents who desperately wanted the child. If so, it is difficult to believe that in a future case presenting such a factual situation a court could not qualify the right of "first refusal" rule, contended for by the father in *Irby*, to disqualify a father who seemed to be engaging in unreasonably dilatory tactics, or who approached the prospective parents with a 'deal.'

No additional statutes or cases were offered as authority in *Irby*. The court's further arguments in substantiation of its decision may

⁷ *Id.* at 307-08, 37 Cal. Rptr. at 882. It should be noted that subsequent to the 1935 *Campbell* decision CAL. CIV. CODE § 24 has been amended, and the number of situations in which the mother's consent to the adoption of an illegitimate child is unnecessary has been increased. Cal. stats. 1939 ch. 463 §1. This is some indication of a liberalization of the legislative intent which would seem to weaken *Campbell* as authority upon which to base a valid construction of CAL. CIV. CODE § 224. The authority is further weakened by the fact that *Campbell* construed § 224 within a factual framework far different from that presented by *Irby*. See note 4 *supra*. Moreover, the *Campbell* court said only that the father's claim of right of preference was persuasive insofar as it states a general rule bearing on the discretion of the court in adoption proceedings, but that it had no force in the appellate court because the statutes did not limit the trial court's discretion, and there had been no finding that the father was competent and suitable. 9 Cal. App. 2d at 624, 51 P.2d at 139.

⁸ 226 Adv. Cal. App. at 307, 37 Cal. Rptr. at 882.

be summarized as follows: first, the father was a minor and not in a position to take care of and support the child; and second,

If it were held that the father . . . has the right to block the adoption proceeding, the mother will be faced with a decision as to whether she will raise the child herself or permit the father to have its custody. . . . If the mother is forced to rear the child, her chances of completing her education and of entering into a normal happy marriage will be substantially diminished.⁹

It is evident that the court used the singular facts of this particular case to enunciate a very broad rule in the process of reaching a justifiable decision.

The court's failure to quote California Civil Code § 224 more extensively than it did is misleading. The court omitted portions of the statute which provide that the consent of a father or mother is not necessary if: first, the father or mother has been judicially deprived of, or has voluntarily in a judicial proceeding of another jurisdiction, given up the custody of the child; second, where the father or mother has deserted the child without provision for its identification; or third, the father or mother of any child has relinquished said child for adoption as provided in California Civil Code § 224m, or has relinquished custody to a licensed or authorized child-placing agency in another jurisdiction.¹⁰

Section 224m should be examined further in light of the peculiar factual situation presented by this case. If the mother had placed the child for adoption with a licensed agency rather than with the Ellis family, there would be no doubt that her consent would be unnecessary to authorize a subsequent adoption by whomever the agency deemed fit. Having signed a written statement relinquishing her child, her further consent to a subsequent adoption is not required.¹¹ If a father tries to adopt his natural son after the child has been relinquished a licensed adoption agency, the mother's consent is not a prerequisite if the father qualifies as a proper adoptive parent. Even the natural mother's active opposition to the father's adoption of the child would not prevent his doing so unless the relinquishment was to be rescinded by the mutual consent of the mother and the adoption agency.¹² The difference between this hypothetical situation and the *Irby* case is that in *Irby* the mother gave the child to a private couple for adoption rather than to a licensed adoption agency; yet in the adoption agency situation described above the permission of

⁹ *Id.* at 308, 37 Cal. Rptr. at 882.

¹⁰ CAL. CIV. CODE § 224.

¹¹ CAL. CIV. CODE § 224m.

¹² CAL. CIV. CODE §§ 224m, 226a.

the mother *isn't* required for the natural father to adopt, while in the *Irby* situation her permission *is* required. In both cases the act of the mother is a refusal on her part to continue her custody and care of the child; in both cases the mother presumably intends that the severance of the ties with her child shall be permanent and irrevocable; in both cases the mother has indicated that she is giving up all her rights to the child. The California Supreme Court in *Adoption of McDonald*¹³ said: "The right of a natural parent to refuse consent is based on the natural affection between parent and child. . . . Manifestly the same 'natural and sacred rights' are not present when a child has been relinquished to an agency for adoption."¹⁴ The natural affection between parent and child is as lacking in the case of a mother who relinquishes her child to private persons as it is when she relinquishes it to a licensed agency, except for her selecting the new parents which guarantees that the father will not get the child. In *Irby*, when Sue, the natural mother, put her child up for adoption she was giving up her rights in the child in a direct adoptive situation. She was complying, as far as her actions went, with the provisions of law.¹⁵ One commentator has stated:

The right of parents permanently to dispose of their children, completely abdicating their rights and escaping their responsibilities, is hardly to be counted as an aspect of the right to control and rear them. In fact, it is precisely the opposite. It is an extinguishment of the right. What biological parents do with their children when they keep them is one thing; what they do with them when they get rid of them is quite another. Parental renunciation of rights and duties—whether through the independent or agency system—is legitimized abandonment; . . .¹⁶

When Sue relinquished the child her role ceased, and her lack of consent to subsequent efforts by the father to adopt the child, therefore, should have been of no moment since her consent was required neither by logic nor statutory mandate. The plea of the natural father for an opportunity to adopt should have been given some weight. If the mother's consent is not pertinent after relinquishment the case hinges on one question: should the natural father be afforded an opportunity under the provisions of California Civil Code § 230 to adopt his child prior to giving the child to strangers, all other facts being equal (which they admittedly were not in this case)?

To reach an answer the criteria for adoption should be examined. The welfare of the child is to be considered in adoption proceed-

¹³ 43 Cal. 2d 447, 274 P.2d 860 (1954).

¹⁴ *Id.* at 459, 274 P.2d at 867.

¹⁵ CAL. CIV. CODE § 224.

¹⁶ Jacobus tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261, 346 (1955).

ings.¹⁷ The *Campbell* court indicated that the natural father, in a situation where his permission or preference is pertinent, is not favored simply because of his status as the natural father.¹⁸ Indeed, it has been said:

Under the facts of the case before us there can be no doubt that when the mother's consent to adopt was executed the child was illegitimate. All parental rights then existed solely in the child's mother. . . . The natural father was then not even entitled to preference or special consideration in a proceeding by others to adopt the child. . . . He had no existing or vested parental rights. He did have certain inchoate rights of parenthood which would vest if he elected to legitimate his child.¹⁹

In *Adoption of Barnett*²⁰ the Supreme Court of California expressly disapproved of the cases wherein a preference for the natural father was evident solely because of his status as such, by saying: "The rule of strict construction of our adoption statutes in favor of the natural parents . . . being inconsistent with the rationale of the decisions of this court . . . as well as with Civil Code section 4, is disapproved."²¹ But no cases have been found in which the court has favored strangers over the natural father when the natural father from the time of the child's conception attempted to legitimate the child, and to perform the functions of a father, but was prevented from doing so by a mother who had turned her back not only on him but also on the child. No case, that is, except *Irby*.

- Refusal to give the natural father a preference has not always been the prevailing rule. Chief Justice Beatty, in a dissent in *In the Matter of Estate of Jessup*,²² said that California Civil Code § 230 was:

[D]esigned to secure to innocent unfortunates in . . . [the child's] situation a just share of the rights to which they are by nature as fully entitled as are legitimate offspring. . . . I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest humane man should be not only willing but eager to do . . . [legitimate the child].²³

An examination of the pertinent statutes shows that the law does favor the natural father under certain conditions. The simplified procedure prescribed by California Civil Code § 230 is available *only* to fathers and constitutes an informal and inexpensive method whereby a natural father may adopt his own child. The section ex-

¹⁷ *Adoption of Lingol*, 107 Cal. App. 2d 457, 237 P.2d 57 (1951).

¹⁸ 9 Cal. App. 2d at 624, 51 P.2d at 139.

¹⁹ *Adoption of Laws*, 201 Cal. App. 2d 494, 500, 20 Cal. Rptr. 64, 67-68 (1962).

²⁰ 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960).

²¹ *Id.* at 378, 354 P.2d at 22-23, 6 Cal. Rptr. at 566.

²² 81 Cal. 408, 22 Pac. 742 (1889).

²³ *Id.* at 435, 22 Pac. at 750.

cludes all other persons, even if related. Even the *Laws* case, while deprecating any preference for the natural father, hints that there does exist some special relationship ("certain inchoate rights") worthy of recognition.²⁴ Under California Civil Code § 230, to adopt his own illegitimate child the father merely has to acknowledge the child as his own, receive it into his home, and treat it as his own. By giving to the natural father alone such a short-cut method of adoption it is evident that the Legislature recognized the existence of some special relationship other than biological between the father and the child. This statutory recognition should be construed to constitute a legislative preference, despite the words of the *Irby* court.

If one assumes that the natural father does occupy some special position with respect to his natural though illegitimate child, a position recognized by logic and the Legislature, the weakness of the *Irby* rule is evident. If one asks who has greater rights in the child, the natural father or strangers to the child, other factors being equal, the father must prevail. Speaking for the court, Justice (now Chief Justice) Traynor said in *McDonald*:

The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child.²⁵

What relationship could more closely resemble this "closest conceivable counterpart of the relationship of parent and child" than the relationship between a natural father and his own child? Is the relationship between stranger and child more intimate, more natural, more to be encouraged? If in some future case an affluent, deserving, and responsible father who is capable of providing a fine home for his child were to attempt to adopt his own child over the objections of an immature and irresponsible mother who maliciously desired to keep their illegitimate child out of the hands of the father, yet refused to raise the child herself, the mischievous rule of *Irby* would bar the father. The child in such case, under the *Irby* rule, would suffer the loss of the love and care of his natural father, and might also stand to lose the economic benefits of such a relationship, possibly including a substantial inheritance. Not only would justice be refused the father in such case, but the welfare of the child might be seriously affected.

In *Irby* the court could have enunciated a much narrower rule, one more in keeping with the obvious legislative intent. Apparently

²⁴ 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68.

²⁵ 43 Cal. 2d at 459, 274 P.2d at 867.

the court in the first instance excluded Jimmy Bryant as a prospective adoptive parent for some cause or reason (not expressly identified in the record), and then enunciated a rule bolstering that decision. Though such *ad hoc* rules are reasonable within their peculiar factual settings, they can result in future legal abuses when applied mechanically to a different factual situation. On the facts presented the *Irby* decision was probably valid and just, but one must view with trepidation the prospective application of its broad rule.

It is submitted that the *Irby* court should have stated that when the mother has relinquished the control and custody of her illegitimate child the natural father, if a fit and proper parent under the law, should preferentially be given the first opportunity under the provisions of California Civil Code § 230 to adopt his own child. The *Irby* court could, under such a rule, have found upon the facts that Jimmy Bryant was not a fit and proper parent, and so reached the correct result by way of a reasonable rule which would not be as likely to create future injustice as the rule actually promulgated by the court. A potentially mischievous rule need not be promulgated to afford protection against possible abuses when the discretion of the courts may be relied upon to intelligently appraise the facts and prevent the perpetration of the evil designs of a minority of individuals who may in the future find themselves in the unfortunate circumstances of Jimmy Bryant. In creating this rule, the *Irby* court ignored a superior rule, the welfare of the child, which would have achieved the same result.

Edward J. Leavitt